

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
East Cleveland Cable TV &)	
Communications, LLC)	CSR-7157-A
)	CSR-7206-M
Petition for Modification of the Cleveland, Ohio)	
Designated Market Area With Regard to)	
Television Station WGGN (TV), Sandusky, OH)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: August 22, 2007

Released: August 23, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we address the petition for special relief filed by East Cleveland Cable TV and Communications, LLC (“East Cleveland Cable”). East Cleveland Cable seeks to modify the Cleveland, Ohio designated market area to exclude two East Cleveland communities (“cable communities” or “communities”)¹ from the television market of Christian Faith Broadcast, Inc., Licensee of WGGN (TV), Channel 52, Sandusky, Ohio (“WGGN”) for the purposes of the Commission’s cable television mandatory broadcast signal carriage rules. WGGN filed an opposition, and East Cleveland Cable has filed a reply.

2. We also address a mandatory carriage complaint filed by WGGN against East Cleveland because of the cable operator’s refusal to carry the station’s television signal in the cable communities. East Cleveland filed an Opposition to the Complaint. We jointly consider the Complaint and the Petition because they are interrelated.

II. BACKGROUND

3. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues (“Must Carry Order”)*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.² A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of

¹ East Cleveland Cable seeks to exclude Bratenahl, Ohio and East Cleveland, Ohio from WGGN-TV’s market.

² 8 FCC Rcd 2965, 2976-77 (1993).

³ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available,

others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.⁴

4. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the Community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which

commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁴ For a more complete description of how counties are allocated, *see* Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵ 47 U.S.C. §534(h)(1)(C).

⁶ *Id.*

form their economic market.

* * * *

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁷

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁸

5. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.
- (2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁹

- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.

⁷ H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁸ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁹ The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

A. Market Modification

6. As a statutory factor, historical carriage of a station by the cable system serving the subject communities is considered evidence of a close economic relationship between the station and the communities. With respect to historical carriage, East Cleveland Cable states that it has never carried WGGN in the cable communities.¹¹ WGGN, however, explains that its lack of historical carriage may reflect its status as a specialty station that like other “specialty stations” faces carriage discrimination.¹² Similarly, the Commission has held that a station’s carriage on cable systems located near the subject communities may be indicative of close economic ties between the station and the subject communities.¹³ East Cleveland Cable states that the nearby Time Warner system serving communities situated between Sandusky and East Cleveland Cable have never carried WGGN,¹⁴ while WGGN explains that it is carried on Time Warner cable systems serving West Cleveland and Elyria, the latter of which is located “directly between Sandusky and the Communities.”¹⁵ WGGN further states that East Cleveland Cable carries WUAB (TV), a station licensed to Lorain, Ohio and located approximately 28 miles from WGGN (approximately midway between Sandusky and East Cleveland).¹⁶

¹⁰ 47 C.F.R. §76.59(b).

¹¹ See Petition for Special Relief at 5.

¹² See *id.* (citing *Nationwide Communications, Inc.*, 10 FCC Rcd 13040, 13043 (1995); *cf. Family Stations, Inc.*, 18 FCC Rcd 22916, 2292 (2003) (“In analyzing a specialty station’s request to modify it[s] television market, historical carriage and local viewership are not as important in the analysis.”)). WGGN states that it broadcasts approximately 150 hours of religious and values-based programming per week. See Opposition at 5.

¹³ See *Paxson Atlanta License, Inc.*, 13 FCC Rcd 20087, 20092 (1998).

¹⁴ See Petition for Special Relief at 6 (citing *Cablevision of Cleveland, L.P. and V Cable, Inc.*, 11 FCC Rcd 18034 (CSB 1996), *rev. denied*, 16 FCC Rcd 15575 (2001)). East Cleveland Cable emphasizes that in 1996, the Commission excluded the Time Warner communities from the market of WGGN and therefore, the communities served by East Cleveland Cable should likewise be excluded. See *id.*

¹⁵ See Opposition at 3.

¹⁶ See *id.*

7. In its reply, East Cleveland Cable contends WGGN has been unable to obtain historical carriage in the cable communities because of the failure of the station to provide local service, a Grade B signal over the communities, and local programming as well as because of the geographic distance between East Cleveland and the cable communities.¹⁷ East Cleveland Cable contends that these factors were determinative in *Cablevision of Cleveland, L.P. and V. Cable, Inc. ("Cablevision of Ohio")*,¹⁸ a case that East Cleveland Cable argues is indistinguishable from, and thus, should control, this decision.¹⁹

8. East Cleveland Cable's contention that there is no historical carriage of WGGN on its system is not refuted. The station's carriage in Elyria is not indicative of close economic ties between WGGN and the subject communities as Elyria is located approximately 30 miles from the subject communities and is located midway between Sandusky and East Cleveland. Similarly, West Cleveland is not sufficiently proximate to the target communities to show close economic ties between the target communities and the station. Furthermore, East Cleveland Cable's carriage of a station in Lorain is not indicative of close economic ties between WGGN and the subject communities because Lorain is approximately 30 miles from the target communities and is located midway between Sandusky and East Cleveland. Nevertheless, because WGGN offers specialized content, cable systems may be more reluctant to carry this station because of its appeal to smaller, niche audiences. For this reason, the Bureau has traditionally not given much weight to a lack of historical carriage of specialty stations.²⁰ As noted by East Cleveland Cable in its Reply, the Bureau in *Cablevision of Ohio* found that despite its specialized format, WGGN's lack of historical carriage in the Cleveland area was of "evidential significance when linked with other information regarding the market and the particular distances involved...."²¹ Nevertheless, as will be discussed below, new evidence offered by WGGN regarding the scope of its market and local service to the cable communities suggest that WGGN's lack of historical carriage is not determinative in this case.

¹⁷ See Reply at 6.

¹⁸ 11 FCC Rcd 18034 (1996) ("*Cablevision of Ohio*"), rev. denied, 16 FCC Rcd 15575 (2001) ("*Cablevision Reconsideration*").

¹⁹ See Reply at 6. In *Cablevision of Ohio*, the Bureau excluded WGGN from several communities served by Cablevision of Ohio, including Bratenahl and Cleveland, Ohio. See *Cablevision Reconsideration*, 16 FCC Rcd at 15577-78.

²⁰ See, e.g., *KTNC Licensee, LLC*, 18 FCC Rcd 16269, 16278 (2003); *Falcon Cable Systems Co. II, L.P.*, 18 FCC Rcd 23774, 23781 (2003).

²¹ See Reply at 6.

9. Another factor that guides the Bureau's analysis is whether television stations provide coverage or other local service to the cable communities. East Cleveland suggests that WGGN is so remote from the cable communities that the station is incapable of providing Grade B coverage over the cable communities.²² This physical distance, asserts East Cleveland Cable, by itself is indicative of a lack of local connection with the cable communities as East Cleveland and Bratenahl are approximately 59 miles from Sandusky.²³ Furthermore, East Cleveland Cable asserts that WGGN fails to provide any programming or other local service of relevance to residences in the cable communities.²⁴ In support of this contention, East Cleveland Cable states that the "the principal local print source of television listings for residents of the Communities, does not list WGGN in its TV listings."²⁵ East Cleveland Cable also contends that it carries several stations that do provide programming local to the cable communities.²⁶ In response, WGGN asserts that the physical distance is not so overwhelming as to lead to the conclusion that the cable systems are outside WGGN's market.²⁷ WGGN also asserts that contrary to East Cleveland's contention, the station does provide Grade B coverage to a "majority of both of the Communities and provides Grade A service to significant portions of the City of East Cleveland."²⁸ In this regard, WGGN has submitted a Longley Rice study which shows that WGGN places Grade A and Grade B coverage over a substantial portion of East Cleveland and Grade B service over a substantial portions of Bratenahl. In view of the above we find that WGGN provides local service to the subject communities.

10. Viewership in the communities is the final factor argued by the parties. East Cleveland Cable concludes its arguments by stating that WGGN has "no market share" and is "not significantly viewed" in the cable communities because WGGN fails to provide Grade B coverage and because residents living in the communities have a "relative inability ... to obtain program information about WGGN."²⁹ WGGN argues that East Cleveland Cable has failed to show that the station lacks viewership.³⁰ Moreover, asserts WGGN, viewership should be discounted in this case because WGGN is a specialty station that appeals primarily to niche audiences by definition.³¹

²² See Petition for Special Relief at 6-7.

²³ See *id.* In support of this contention, East Cleveland Cable states that the Commission in prior market modification decisions has held that Ashland and Medina, Ohio were "geographically remote" from Sandusky at distances of 45 and 50 miles respectively. See *id.* at 7.

²⁴ See *id.* at 8-9.

²⁵ See *id.* at 8.

²⁶ See *id.* at 9. These stations include WEWS (TV), WJW (TV), WOIO (TV), WQHS (TV), WUAB (TV), and WVIZ (TV) in Cleveland, Ohio, as well as WBNX (TV) and WVPX (TV) in Akron, Ohio.

²⁷ See Opposition at 4 (noting that in *Time Warner Entertainment-Advance/Newhouse Partnership*, 13 FCC Rcd 5900 (1997), the Commission refused to exclude cable communities approximately 75 miles from the station's community of license). In support of this contention, WGGN states that East Cleveland Cable carries two stations licensed in Akron, Ohio, located more than 30 miles south of East Cleveland. See *id.*

²⁸ See *id.* at 4.

²⁹ See Petition for Special Relief at 9.

³⁰ See Opposition at 8.

³¹ See *id.* at 6. WGGN also argues that East Cleveland Cable failed to provide evidence required by the Commission rules, and as a result, Commission rules require that the Petition be dismissed without prejudice. See Opposition at 7 (citing 47 C.F.R. § 75.59(b)). Because East Cleveland Cable only supplied the predicted coverage map of WGGN in the 2005 Television and Cable Factbook, asserts WGGN, the petition should be dismissed. See *id.* Because we

11. With respect to viewership, we agree with WGGN. We acknowledge that as a station with a specialized format, WGGN may have difficulty developing substantial numbers of viewers or carriage rights but the station may nonetheless be particularly valuable to underserved populations within a community. Therefore, like historical carriage, we will give limited weight to this factor.³²

12. Based on the totality of the evidence in this proceeding, we find that WGGN serves the communities at issue and reject East Cleveland Cable's petition to modify the station's television market as it relates to the communities at issue.

b. Mandatory Carriage Complaint

13. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in the *Must Carry Order*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.³³ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.³⁴

14. Pursuant to the Commission's must carry rules, cable operators have the burden of showing that a commercial station that is located in the same television market is not entitled to carriage.³⁵ One method of doing so is for a cable operator to establish that a subject television signal, which would otherwise be entitled to carriage, does not provide a good quality signal to a cable system's principal headend.³⁶ For UHF commercial television stations, the standard used to determine what constitutes a good quality signal at a cable system's headend is -45 dBm.³⁷ Should a station fail to provide the required over-the-air signal quality to a cable system's principal headend, it still may obtain carriage rights because under the Commission's rules a television station may provide a cable operator, at the station's expense, with specialized equipment to improve the station's signal to an acceptable quality at a cable system's principal headend.³⁸

15. In support of its argument, WGGN asserts that it is a full power commercial station located within the Cleveland-Akron (Canton), Ohio DMA. East Cleveland Cable's system serves two East Cleveland communities within the same DMA.³⁹ WGGN further asserts that it is capable of

deny East Cleveland Cable's Petition on substantive grounds, we need not address WGGN's procedural arguments. WGGN also argues that granting the market modification in this case is directly contrary to the Congressional intent to protect "small independent stations" by the must carry regime. *See id.* at 9 (citing Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, 106 Stat. 1460 at Sections 2(a)(2), (5), (6), (10)-(17)).

³² *See, e.g., KTNC Licensee, LLC*, 18 FCC Rcd 16269, 16278 (2003); *Falcon Cable Systems Co. II, L.P.*, 18 FCC Rcd 23774, 23781 (2003).

³³ 8 FCC Rcd 2965, 2976-77 (1993).

³⁴ 47 C.F.R. § 76.55(e).

³⁵ *See Must Carry Order*, 8 FCC Rcd at 2990.

³⁶ 47 C.F.R. § 76.55(c)(3).

³⁷ 47 U.S.C. § 534(h)(1)(B)(iii); 47 C.F.R. § 76.55(c)(3).

³⁸ *Must Carry Order*, 8 FCC Rcd at 2991.

³⁹ According to WGGN, WGGN sent an election letter to East Cleveland Cable on or about September 27, 2005, electing mandatory carriage for the January 1, 2005 to December 31, 2008 period. On February 12, 2007, asserts WGGN, East Cleveland Cable received a notice from WGGN informing East Cleveland Cable of its failure to meet its carriage obligation.

providing a good quality signal either directly or through alternative delivery methods at its own cost. WGGN states that it is committed, if necessary, to providing a good quality signal via satellite delivery to the East Cleveland cable headend. In opposition, East Cleveland Cable asserts that using a ten element corner reflector yagi antenna at the top of a 100' tower aimed at the station produced RF levels in the -87 dbm range, an insufficient signal strength.

16. Although East Cleveland Cable asserts that WGGN fails to provide a good quality signal to the system's headend, WGGN asserts that it is committed to providing a good quality signal at its own expense via satellite delivery. We conclude that WGGN's suggested delivery of its signal via satellite is an acceptable alternative pursuant to Section 76.55(c)(3) of the Commission's rules.⁴⁰

IV. ORDERING CLAUSES

17. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (CSR-7157-A), filed by East Cleveland Cable TV & Communications, LLC **IS DENIED**.

18. **IT IS FURTHER ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, that the petition for carriage filed by East Cleveland Cable TV & Communications, LLC **IS GRANTED** and that East Cleveland Cable TV & Communications, LLC shall commence carriage of WGNN (TV) within sixty (60) days of the date that WGGN (TV) provides a good quality signal to the cable system's principal headend.

19. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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⁴⁰ See *Rancho Palos Verdes Broadcasters, Inc. v. Lone Pine Television, Inc.*, 18 FCC Rcd 7068, 7071 (2003).

⁴¹ 47 C.F.R. § 0.283.